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**RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND**

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VERSAILLES DEVELOPMENT CO., LLC,

Plaintiff,

v.

EQUILON ENTERPRISES LLC and THE SHAW
GROUP INC.,

Defendants.

No. C 06-05872 CW

ORDER GRANTING
DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT
AND DENYING
PLAINTIFF'S MOTION
FOR LEAVE TO FILE AN
AMENDED COMPLAINT

Defendants Equilon Enterprises LLC and Shaw Group Inc. move separately for summary judgment. Plaintiff Versailles Development Co. opposes the motions and cross-moves for leave to file an amended complaint adding Shaw Environmental, Inc. as a party.¹ The motions were heard on November 8, 2007. Having considered the parties' papers and oral argument on the motions, the Court grants Defendants' motions to dismiss and denies Plaintiff's motion for leave to file an amended complaint.

BACKGROUND

This case arises out of an environmental indemnity agreement

¹Both Equilon and Shaw Group note that Plaintiff's oppositions were untimely under the Court's scheduling order. Further, Shaw Group notes that Plaintiff's cross-motion was not properly noticed.

1 between Defendant Equilon and Plaintiff in which Equilon agreed "to
2 indemnify, defend, and hold harmless [Plaintiff and its lender]
3 from and against Environmental Losses" related to the possible
4 contamination of land on which Plaintiff intended to build
5 condominiums. Shepardson Decl., Ex. B at 3. The contract
6 acknowledged prior contamination. When contamination was
7 discovered, Equilon hired Shaw Environmental, Inc. to perform
8 remediation work. This dispute arises out of Plaintiff's claim
9 that significant delays occurred and additional remediation was
10 performed, for which Equilon has not reimbursed it.

11 Plaintiff brings claims for (1) breach of written contract
12 against Equilon; (2) express indemnity against Equilon;
13 (3) negligence against Equilon and Shaw Group; and (4) intentional
14 misrepresentation against Equilon. Based on these claims,
15 Plaintiff seeks damages including punitive damages.²

16 LEGAL STANDARD

17 Summary judgment is properly granted when no genuine and
18 disputed issues of material fact remain, and when, viewing the
19 evidence most favorably to the non-moving party, the movant is
20 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
21 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
22 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
23 1987).

24 The moving party bears the burden of showing that there is no

25 ²Plaintiff does not oppose Equilon's motion for summary
26 judgment with respect to its claim for damages for emotional
27 distress. The Court grants the motion to the extent it relates to
28 damages for emotional distress.

1 material factual dispute. Therefore, the court must regard as true
2 the opposing party's evidence, if supported by affidavits or other
3 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
4 F.2d at 1289. The court must draw all reasonable inferences in
5 favor of the party against whom summary judgment is sought.
6 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
7 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
8 1551, 1558 (9th Cir. 1991).

9 Material facts which would preclude entry of summary judgment
10 are those which, under applicable substantive law, may affect the
11 outcome of the case. The substantive law will identify which facts
12 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
13 (1986).

14 Where the moving party does not bear the burden of proof on an
15 issue at trial, the moving party may discharge its burden of
16 production by either of two methods. Nissan Fire & Marine Ins.
17 Co., Ltd., v. Fritz Cos., Inc., 210 F.3d 1099, 1106 (9th Cir.
18 2000).

19 The moving party may produce evidence negating an
20 essential element of the nonmoving party's case, or,
21 after suitable discovery, the moving party may show that
22 the nonmoving party does not have enough evidence of an
essential element of its claim or defense to carry its
ultimate burden of persuasion at trial.

23 Id.

24 If the moving party discharges its burden by showing an
25 absence of evidence to support an essential element of a claim or
26 defense, it is not required to produce evidence showing the absence
27 of a material fact on such issues, or to support its motion with
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1 evidence negating the non-moving party's claim. Id.; see also
2 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.
3 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the
4 moving party shows an absence of evidence to support the non-moving
5 party's case, the burden then shifts to the non-moving party to
6 produce "specific evidence, through affidavits or admissible
7 discovery material, to show that the dispute exists." Bhan, 929
8 F.2d at 1409.

9 If the moving party discharges its burden by negating an
10 essential element of the non-moving party's claim or defense, it
11 must produce affirmative evidence of such negation. Nissan, 210
12 F.3d at 1105. If the moving party produces such evidence, the
13 burden then shifts to the non-moving party to produce specific
14 evidence to show that a dispute of material fact exists. Id.

15 If the moving party does not meet its initial burden of
16 production by either method, the non-moving party is under no
17 obligation to offer any evidence in support of its opposition. Id.
18 This is true even though the non-moving party bears the ultimate
19 burden of persuasion at trial. Id. at 1107.

20 DISCUSSION

21 I. Equilon

22 Equilon moves for summary judgment on Plaintiff's fourth cause
23 of action for fraudulent misrepresentation and related claim for
24 punitive damages. Plaintiff's fourth cause of action alleges that
25 Equilon "intentionally misrepresented . . . that it would indemnify
26 plaintiff for all losses associated with hazardous substances
27 located on plaintiff's property" and that Equilon made these
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1 misrepresentations "for the purpose of inducing plaintiffs to
2 purchase [the property] and to induce plaintiffs to obtain a loan
3 for building condominiums on the property." Complaint ¶ 39.
4 Further, Plaintiff alleges that at the time Equilon made these
5 representations, "they were untrue, and defendant knew them to be
6 untrue." Id. at ¶ 40.

7 Equilon argues that Plaintiff's claim fails because "the
8 evidence shows that Equilon intended to, and in fact did, perform
9 its obligations under the Agreement." Equilon Motion at 8.
10 Equilon submits the declaration of Timothy Ripp, a senior geologist
11 employed by Shaw Environmental and project manager for the
12 remediation at issue, in support of its motion. Ripp declares that
13 Equilon "hired Shaw Environmental to characterize and appropriately
14 dispose of contaminated soil and groundwater being removed from the
15 site." Ripp Decl. ¶ 3. Ripp details the work done by Shaw
16 Environmental at Equilon's expense, noting that "118 truck loads of
17 potentially contaminated soil, totaling 2,354.75 tons of material
18 were trucked off the site in trucks hired by Equilon" and that it
19 "treated over 26,000,000 gallons of effluent." Id. at ¶ 12.
20 Further, "Shaw Environmental maintained a presence on this project
21 until excavation was completed and all known petroleum hydrocarbon-
22 impacted soils had been removed." Id. at ¶ 13.

23 Equilon argues that this undermines Plaintiff's assertion that
24 it never intended to perform on the contract. Plaintiff counters
25 that it has sought payment for additional efforts it has undertaken
26 "to clean up contaminated dirt and water and other expenses
27 associated with construction delays as a result of discovery of
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1 contamination." Opposition at 3. Plaintiff also notes that
2 Equilon concedes that it owes some portion of the amount demanded,
3 but has not paid the agreed-upon amount. However, nothing about
4 this tends to prove that, when Equilon signed the contract, it did
5 not intend to perform or to rebut the evidence Equilon has
6 produced.

7 The Court grants Equilon's motion for summary judgment with
8 respect to Plaintiff's claim for fraudulent misrepresentation.
9 Because Plaintiff's claim for punitive damages is based on these
10 allegations, the Court also grants Equilon's motion for summary
11 judgment with respect to these damages.

12 II. Shaw Group

13 Shaw Group moves for summary judgment on all claims against
14 it, because Equilon hired Shaw Environmental, Inc., not the Shaw
15 Group to perform the environmental remediation. Shaw Group
16 provides evidence that while Shaw Environmental is a wholly owned
17 subsidiary of Shaw Environmental & Infrastructure, Inc., which is,
18 in turn, a wholly owned subsidiary of Shaw Group, Shaw Group did
19 not perform or direct any of the work on the project or supervise
20 any of the employees. Rankin Decl. ¶¶ 2-4; Ripp Decl. ¶¶ 4-6.
21 Further, Shaw Group provides evidence that on February 22, 2007 its
22 counsel contacted counsel for Plaintiff to explain that it had sued
23 the wrong entity and offered two stipulations: one to add Shaw
24 Environmental and to dismiss Shaw Group from the case and another
25 allowing amendment of the answer to allow it to be on behalf of
26 Shaw Environmental rather than Shaw Group. Shepardson Decl. ¶ 7 &
27 Ex. A. Plaintiff never approved the filing of the stipulation and
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1 did not add Shaw Environmental as a defendant in the case by the
2 April 20, 2007 deadline for adding new parties or claims.
3 Plaintiff opposes Shaw Group's motion and now cross-moves for leave
4 to file an amended complaint adding Shaw Environmental as a party.

5 The Court first addresses Plaintiff's cross-motion. As Shaw
6 Group notes, Plaintiff's motion is improperly styled as a motion
7 for leave to file an amended complaint. Because the deadline for
8 adding additional parties has passed, Plaintiff must seek leave to
9 modify the schedule established in the Court's case management
10 order. Federal Rule of Civil Procedure 16(b) provides that such a
11 schedule "shall not be modified except upon a showing of good cause
12 and by leave of the district judge." Even construing Plaintiff's
13 motion as a motion for leave to modify the schedule, Plaintiff has
14 not demonstrated good cause. It is undisputed that Plaintiff was
15 aware that it had named the wrong entity before the deadline for
16 adding additional parties. Plaintiff has provided no reason for
17 its delay. As the Ninth Circuit has held, "A scheduling order is
18 not a frivolous piece of paper, idly entered, which can be
19 cavalierly disregarded by counsel without peril." Johnson v.
20 Mammoth Recreations Inc., 975 F. 2d 604, 610 (9th Cir. 1992). The
21 Court denies Plaintiff's cross-motion for leave to file an amended
22 complaint.

23 Plaintiff also argues that the arguments raised in Shaw
24 Group's motion for summary judgment are precluded by judicial
25 estoppel based on various positions Plaintiff alleges were taken in
26 earlier pleadings. "Judicial estoppel precludes a party from
27 gaining an advantage by asserting one position, and then later
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1 seeking an advantage by taking a clearly inconsistent position."
2 Klamath Siskiyou Wildlands Center v. Boody, 468 F.3d 549, 554 (9th
3 Cir. 2006) (quoting Hamilton v. State Farm Fire & Cas. Co., 270
4 F.3d 778, 782 (9th Cir. 2001)). Plaintiff notes that Shaw Group
5 admitted in its answer that "at the time of the events that are the
6 subject of this Complaint, Shaw was doing business in the State of
7 California, County of San Mateo." Shaw Answer ¶ 5. However, as
8 Plaintiff acknowledges, this is not an admission that Shaw Group
9 was working on the job at issue in this case. Further, the answer
10 denied the allegation that Equilon "retained Shaw for the purpose
11 of monitoring, conducting testing and clean-up of hazardous
12 substances," Complaint ¶ 12; Answer ¶ 12, and specifically stated
13 an affirmative defense that damages suffered by Plaintiff were
14 caused by the conduct "of persons or entities other than Shaw, for
15 which Shaw is not liable or responsible." Shaw Answer ¶ 30. This
16 undermines Plaintiff's argument that Shaw Group failed to inform
17 the Court that it was not a proper defendant.

18 This leaves only Plaintiff's argument that Shaw Group failed
19 to name Shaw Environmental in its certification of interested
20 entities or persons attached to its answer. Shaw Group's failure
21 to include Shaw Environmental on the list of interested entities is
22 not a sufficient basis on which to invoke the doctrine of judicial
23 estoppel.

24 Further, Plaintiff's criticisms of the declarations filed in
25 support of Shaw Group's motion for summary judgment do not provide
26 grounds on which to deny that motion. As Shaw Group points out,
27 the deficiencies noted do not address the purposes for which those
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1 declarations were cited. Plaintiff further suggests that there
2 might be triable questions of fact suggesting that Shaw Group was
3 involved in the project at issue. However, the evidence Plaintiff
4 cites is not sufficient to rebut Shaw Group's clear evidence that
5 it was not involved in the project.

6 The Court grants Shaw Group's motion for summary judgment.

7 CONCLUSION

8 For the foregoing reasons, the Court GRANTS Equilon's motion
9 for summary adjudication of Plaintiff's fourth cause of action for
10 intentional misrepresentation, the related claim for punitive
11 damages and the claim for damages for emotional distress (Docket
12 No. 33), DENIES Plaintiff's motion for leave to file an amended
13 complaint (Docket No. 50) and GRANTS Shaw Group's motion for
14 summary judgment (Docket No. 28). Equilon and Shaw Group's
15 objections to Plaintiff's evidence submitted in opposition to their
16 respective motions for summary judgment are denied as moot (Docket
17 Nos. 54, 55). The Court did not consider any improper or
18 inadmissible evidence in deciding these motions.


19 As discussed at the hearing, by November 29, 2007, Defendant
20 shall file a further motion for summary judgment on the issue of
21 whether consequential damages are recoverable under the indemnity
22 agreement. Plaintiff shall file an opposition, and cross-motion if
23 desired, by December 13, 2007 and Defendant shall file any reply by
24 December 20, 2007. Defendant shall notice the motion for hearing
25 on January 10, 2008.

26 The deadline for disclosure of expert witnesses and exchange
27 of expert reports is extended to December 10, 2007. The deadline
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1 for completion of expert discovery is extended to January 11, 2008.
2 The pretrial conference previously scheduled for January 4, 2008
3 will now be held on January 29, 2008. The trial previously
4 scheduled for January 14, 2008 will now begin on February 11, 2008.

5 IT IS SO ORDERED

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7 Dated: NOV 13 2007


8 CLAUDIA WILKEN
9 United States District Judge
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